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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

WILLIAM ERIC FOWLER,
Petitioner,

v.

RAYMOND H. PILSON, ETHEL S. PILSON, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

S. WALLACE DEMPSEY,
BRUCE FULLER,
Attorneys for Petitioner,
723 Investment Building,
Washington, D. C.

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OCTOBER TERM, 1941.

No. .....

WILLIAM ERIC FOWLER,
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v.
RAYMOND H. PILSON, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

The petitioner, William Eric Fowler, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above styled cause on October 13, 1941. (R. 24.)

Opinions Below.

The opinion of the District Court of the United States for the District of Columbia (R. 8-10) is not reported, and the opinion of the United States Court of Appeals for the District of Columbia decided October 13, 1941 (R. 16-24) is reported in Fowler v. Pilson, *et al.*, 123 F. (2d) 918.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 13, 1941. A petition for a rehearing was denied on December 6, 1941 (R. 25). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (28 USCA §347.)

Statutes Involved.

The statutes involved are set forth in the Appendix, *infra*, p. 30.

Statement.

The following facts are not in dispute:

Petitioner is the assignee of a judgment rendered against defendant, Raymond H. Pilson, in 1930, by a court of the State of California, for $20,199.20, and attorney fees, costs, and interest at 7% from that date. (R. 8.) Petitioner filed this equity action, a creditor's bill, here in 1937, against said Pilson, a resident of California, and the trustees under the will of Pilson's grandfather, to impress a lien on the interest Pilson had in his grandfather's estate located here, which is not subject to be taken on legal process. (R. 2.)

Petitioner pleaded his California judgment against the debtor as evidence of the debt, and that execution was issued and returned wholly unsatisfied. (R. 8.) Pilson has had no property subject to levy since said judgment was obtained, except his interest in his grandfather's estate. (R. 3, 8.)

Petitioner further alleged that his judgment was enforceable when this action was brought; that §685 of the California Code (Appendix, *infra,* p. 30) provides that,—"In all cases the judgment may be enforced *or* carried into execution, after the lapse of five years * * *," and if Pilson then had property in California he could have had the judgment enforced or carried into execution, and it was not barred by §343 Title 24 of the D. C. Code, but was capable of being enforced in California (Appendix, *infra,* p. 30). (R. 2.)

Subsequent to bringing this action, petitioner discovered that Pilson had assigned in April 1932 his interest in said estate to his Mother, and filed an amended complaint making her a defendant, alleging that said assignments were made without consideration, and to defraud petitioner, and praying to have them decreed to be void. (R. 3.)

Defendants moved to dismiss the complaint and the amendments thereto on the ground that they did not state facts sufficient to entitle him to the relief prayed,—that petitioner was not a judgment creditor of any court of the District of Columbia, and had not exhausted his remedies at law. The Court overruled this motion (R. 3), because on the undisputed facts alleged petitioner has no plain, adequate remedy at law, as Pilson is a non-resident, and had no property when the complaint was filed or since, except his interest in his grandfather's estate. (Findings of Fact by the District Court, R. 8.)

Defendant's answers set up as a defense that the action was barred by Title 24, §343 of the D. C. Code, and §§335 and 336 of the California Code. (R. 3, 4; Appendix, *infra,* p. 30.)

Subsequent thereto, and in 1939, defendants and petitioner made a written stipulation whereby said Ethel S. Pilson waived any right by reason of said assignments and agreed not to make any claim thereunder, and that the assignments should be considered and treated as though they had not been made. The parties further stipulated that the sole issue to be litigated is whether said judgment is barred by the statute of limitations. (R. 5, 6.)

The Court held that petitioner's action is barred by the Statute of Limitations. (R. 10.)

A motion to have the decision set aside and to have judgment entered for plaintiff, or for a new trial, was filed December 27, 1939. While consideration of this motion was pending, Pilson filed a voluntary petition in bankruptcy on January 27, 1940, (R. 6), and in Schedule A-3 thereof he listed said judgment as a debt not in dispute (R. 6), and swore that his interest in the estate of his grandfather, Benjamin F. Pilson, was subject to an assignment to Ethel S. Pilson. (R. 9.)

Petitioner's motion was overruled, but leave to file a supplemental complaint was granted, which was filed on April 5, 1940.

The trustee in bankruptcy was permitted to intervene and pleaded the statute of limitations, and that the validity of said assignments is no longer an issue (R. 7); and that he adopted the stipulation between the parties including the provision that the sole issue was *whether the judgment* was barred by the statute of limitations. (R. 7.) The Pilsons filed no defense to the supplemental complaint other than to plead that Pilson was discharged in bankruptcy. *(Id.)*

The Court held that the *action* was barred by the statute of limitations. (R. 10.)

Judgment Below.

The Court of Appeals affirmed the decision of the District Court (R. 24), which held that this action is barred by the statute of limitations. (R. 10.)

Specification of Errors to Be Urged.

Petitioner urges that the Court of Appeals erred:

(1) In failing and refusing to confine the appeal to the sole issue as stipulated between the parties,—whether the judgment is barred by the statute of limitations, (R. 6), and in deciding the appeal upon issues withdrawn and excluded from consideration by the stipulation. *(Id.;* R. 17-23.)

(2) In holding that this is an action on the California judgment, and barred by the California statutes contrary to the California law. (R. 19, 21.)

(3) In holding that this suit could not have been maintained in California if brought there when begun here. (R. 19, 21.)

(4) In holding that the judgment could be enforced in California only by proceedings under §685 of the California Code, and by leave of Court. (R. 20, 21, 23.)

(5) In holding that "At the date of this suit, therefore, the California judgment was incapable of being otherwise enforced within the meaning of §343." (R. 19, 21, 23.)

(6) In holding that the judgment was dormant, and could not, therefore, be enforced here. (R. 22.)

(7) In failing and refusing to hold that this is not an action upon the California judgment but a creditor's action of original or exclusive jurisdiction in equity, and not subject to the statute of limitations, but controlled by the doctrine of laches and that it appears that there has been no laches in this case and that this action can be maintained. (R. 3.)

(8) In affirming the decision of the District Court. (R. 24.)

Questions Presented.

The questions at issue are whether the decision of the Court below in construing the California Statutes is in conflict with the decisions of this Court, and the Courts of California, including its highest court, in violation of §34 of the Federal Judiciary Act (28 USCA §725, Appendix, *infra*, p. 31) and of §1, Article IV of the Constitution of the United States; whether the Court below failed to give proper effect to an applicable decision of this Court; whether the Court below erred in deciding a question of general importance and substance relating to the construction and application of §343 of Title 24 of the District Code, a statute within the spirit and purpose of subdivision (c) Par. 5 of Rule 38 of this Court, basically relating to the construction and application of §1, Article 4 of the Constitution, which has not been but should be settled by this Court; and whether the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

Reasons for Granting the Writ.

In affirming the District Court's decision the Court below has so far departed from the accepted and usual course of judicial proceedings, and from that required by §1 of Article IV of the Constitution and §34 of the Federal Judiciary Act, in its construction of the California statutes, as to call for an exercise of this Court's powers of supervision; failed to give proper effect to an applicable decision of this court; has decided a question of general importance and substance relating to the construction and application of said §343, a statute within the purpose of said subdivision (c) Par. 5 of said Rule 38; and has decided important questions of local law in conflict with applicable local decisions.

(1) The Court below erroneously failed and refused to find that the sole issue here is whether the judgment is barred by the statute of limitations, and that it is not so barred, and based its decision on questions excluded from its consideration.

In so holding, the Court below failed to follow the decision of this Court in Tucker v. Alexander, 275 U. S. 228, 230, 231, that

> "All other questions", (than whether the judgment was barred by the statute), "were taken out of the case by stipulation" and the decisions in California,

(Bagley v. Ward, 37 Cal. 121; Metro-Goldwyn-Meyer Corp. v. Freer, 104 F. (2d) 892, C. C. A. 9; Phillips v. Patterson, 53 P. (2d) 807, Cal. App.; and of the District of Columbia; U. S. Casualty v. Dist. of Col., 107 F. (2d) 652, 71 App. D. C. 92.)

And the Court below farther failed and refused to hold that the judgment herein was not barred by the statute, and that petitioner was therefore entitled to recover, and in so holding and refusing to hold the court below failed to follow the decisions of the California courts, which hold that the judgment here was not barred or outlawed, (Powell v. Petch, 136 P. 55, 166 Cal. 329; Puckhaver v. Henry, 152 Cal. 419, 93 P. 114.; Pac. Gas • • • Co. v. Elks Duck Club, 103 P. (2d) 1030, 39.. Cal. App(2)562; Mason v. Cronise, 20 Cal. 212).

(2) The Court below held:

> "• • • that this suit could not have been maintained in California courts if it had been brought there when it was begun here," (R. 19),

because it held that it was an action upon the judgment rendered more than five years before, and barred by said §336; while the California and this Court decisions hold that:

> (a) "The bill • • • by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused by the transfer • • •". (Sewell v. Price, 128 P. 407, 409, 164 Cal. 265).
>
> "• • • this case is not to be treated as an application by a judgment creditor for the exercise of the ancillary jurisdiction of the court, to aid him in executing legal process, but comes under a head of original jurisdiction in equity. It is a bill by a creditor of a deceased debtor, against the administrator and a party who is fraudulently holding all the property of the deceased, which in equity should be applied to the payment of this debt, and the bill prays that the debt may be paid out of this fund." (Hagan v. Walker, 14 How. 29, 33, 14 L. ed. 312, 314, 315.)

It is not "an action to establish a new judgment liability, based upon the old; • • •." (Saunders v. Simms, 183 Cal.

167, 170, 190 P. 806). (See also Sefton v. San Diego Trust & Savings Bank, 106 P. 974, 977, Cal. App.; Richardson v. Michel, 113 P. (2d) 916, 920, Cal. App.; 7 Cal. Jur. §7, p. 796; Hagan v. Walker, 14 How. 29.)

(b) In so holding the Court below failed also to follow the California decisions which hold that the mere lapse of time does not render relief, such as sought by this action, unobtainable, but the creditor's own acts must have made the rendering of relief an injustice. The Court said in a case where it permitted the enforcement of a judgment after 14 years had elapsed:

> "* * * the judgment * * * was for money loaned * * * appellant, had never been satisfied * * *, and *no reason whatever appeared* why in equity and good conscience he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment * * * was entirely without prejudice to any of his legal rights, * * *. * * * the exercise of a sound discretion would require the enforcement of the judgment." (Doehla v. Phillips, 151 Cal. 488, 495, 91 P. 330.) (Italics ours.)

(See also McClelland v. Shaw, 23 Cal. App. (2d) 107, 72 P. (2) 225, delay of 9 years; Peers v. Stall, 32 Cal. App. (2d) 511, 90 P.2d 114, delay of 19 years, hearing by Supreme Court refused; 24 Cal. Law Review, p. 226.)

In Palace Hotel v. Crist, 45 P. (2) 415, 6 C. A. (2) 690, the creditor, 20 years after judgment was entered, was permitted to bring an action against the executors of the debtor estate, and to secure a new judgment for the amount of the debt, to be paid in the course of administration, citing Saunders v. Simms, 183 Cal. 167, 190 P. 806, 808, as a case on all fours with that under consideration.

In the accompanying brief, a list is given of eleven California cases where judgments were enforced which had been entered for more than 5 years before.

The time within which the Court may enforce or carry a judgment into effect is without limitations, (Doehla v. Phillips, 151 Cal. 488, 91 P. 330; 15 Cal. Jur. §257, p. 257.)

(c) The Court below also held that:

> "At the time of this suit * * * the California judgment was incapable of otherwise being enforced within the meaning of Section 343" (R. 23).

The Court below based this conclusion on the following conclusions stated by it:

> (1) "Liberally and most broadly interpreted, the statute" (said §685), "supports this view",—that it "provides a method of enforcing the judgment within the meaning of Section 343" (R. 20), but that
>
> "to give the words 'otherwise enforced' the broadest possible meaning would produce unusual, if not incongruous, results. * * * the purpose" (as claimed of said Section 343) "would be defeated by the broad interpretation for which plaintiff contends". (R. 21).

But this is in conflict with the California decisions, which hold:

> "We fail to understand upon what theory of construction appellant claims that the relief granted by §685 in case of a money judgment, is limited to enforcement by execution. It is true the text of the section is introduced by the disconnected clause 'execution after five years,' but it is apparent from the text, which provides that 'in all cases the judgment may be enforced or carried into execution after the lapse of five years,' that the word 'execution' is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes

of judgments." (Saunders v. Simms, 183 Cal. 167, 169, 190 P. 806).

"In Saunders v. Simms (1920) 183 Cal. 167, 190 Pac. 806, a case on 'all fours' with the instant case the Supreme Court held that the word 'execution' in Section 685 is used in its broadest sense, and the 'procedure is not limited to enforcement by execution but includes such means as are provided by law for the enforcement of various classes of judgments." (Vol. 24 Cal. Law Review, p. 226).

(2) Next, the Court below held that

"* * * Section 343 means a right of enforcement which exists at the time the suit is begun here * * *." (R. 22).

"Issuance of execution is not automatic at the judgment creditor's election. It is discretionary with the court. Unless the discretion is exercised, and in the creditor's favor, the judgment is unenforceable." (R. 23).

This was a holding that petitioner must have appealed to the California Court and have obtained an order for issuance of execution, before bringing this action, which is in conflict with the California decisions, which hold that where as here, an execution was issued and returned *nulla bona*, and it is admitted that the debtor had no property when the judgment was entered, and has had none since, except his interest in his grandfather's estate, which cannot be reached by execution, that the creditor need not first obtain the order provided for by §685, and that specifically this is true where all the property that the debtor had has been transferred, and, as here, the assignee denies the debt. (Heyneman v. Dannenberg, 6 Cal. 376; 7 Cal. Jur. §10, p. 801, and the very numerous cases cited).

And the California cases hold also that where, as here, lapse of time is the sole ground on which the granting of an

order under §685 is opposed, the Court is required to grant the order.

> "There must, then, be something added to the mere fact that the expiration of time and that the debtors were possessed of personal property which would move the court to deny the right given by the statute." (McClelland v. Shaw, 23 Cal. App. 107, 72 P. (2d) 225, 227).
>
> "'* * *. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. * * *.'" (*Id.*).

(See also 11 Cal. Jur. §10, p. 801, and §12, p. 52 and cases cited; Passo v. Bell, 27 Cal. App. (2d) 360, 361, 362; Doehle v. Phillips, 151 Cal. 488, 495, 91 P. 330; Peers v. Stall, *supra*; 24 Cal. Law Review, p. 226).

The Court below next held that:

> "* * * the proceedings * * * constitute, in effect, a method of reviving the judgment, but with relief limited to the issuance of execution." (R. 23).

In so holding the Court below failed to give effect to the California decisions which hold the contrary.

> "* * * the word 'execution' is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes of judgments." (Saunders v. Simms, *supra.*)

(3) The Court below failed to give proper effect to an applicable decision of this Court. This is an action of exclusive equity jurisdiction under the decisions of the Courts of California and of the District of Columbia and of this Court. (Saunders v. Simms, 183 Cal. 167, 170; Halliday v. Halliday, 56 App. D. C. 179, 183; Hagan v. Walker, 14

How. 29, 33, 14 L. ed. 312, 314, 315; Russell v. Todd, 309 U. S. 280, 289, 292).

The Court below held that said §343 of the D. C. Code, and §336 of the California Code applied both to actions at law and suits in equity, and that this action was barred both in California and here by said §336, and thereby failed to give proper effect to the decision in Russell v. Todd, *supra*, holding:

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling." (Russell v. Todd, 309 U. S. 280, 289.)

The decisions in California, in the District, and of this Court uniformly hold that where mere lapse of time is the basis of the defense of limitations, and it appears, (as it does here), that the debtor has not been prejudiced, the action is not barred by lapse. (McClelland v. Shaw, 72 P. (2) 225, 23 Cal. App. (2d) 107; see cases under (a) and (b) of Pt. II above; George v. Ford, 25 App. D. C. 291, affd. 203 U. S. 56; Northern Pac. R. Co. v. Boyd, 228 U. S. 482, and cases cited in 21 C. J. p. 233.)

Moreover, as petitioner did not discover the transfer by the debtor to his Mother until after he had brought this action, laches can not be claimed. (R. 3; Richardson v. Michel, 113 P. (2d) 916, Cal. App.; Halstead v. Grinnan, 152 U. S. 412, 417.)

(4) The issue decided below is of general importance and of substance, and relates to the construction and ap-

plication of a statute within the purpose of subdivision (c) of Par. 5 of this Court's Rule 38, and basically relating to the application of §1 of Article IV of the Constitution. Statutes similar to said §343 are in force in most of the States. (34 C. J. §1577, p. 1109.)

So, whenever an equity action is brought in a State or this District and a foreign judgment accorded recognition as evidence of the indebtedness, the question settled by Russell v. Todd, *supra*, will arise, and this Court has not determined that question in a case under a statute similar to §343.

So long as the effect of such statutes remains undecided by this Court, decisions conflicting with one another and with Russell v. Todd, *supra*, are likely in States, while, (the question being of comity under §1 of Article IV of the Constitution), a decision by this Court will control, and infinite litigation be saved.

Because the issue here is of such widespread importance and is substantial, it is within the purview of said Section (c) and involving as it does an erroneous application of the Rule of limitations and of laches, certiorari should be granted. (West v. American Teleph. & Teleg. Co., 311 U. S. 223, 236.)

WHEREFORE, it is respectfully submitted that this petition should be granted.

S. WALLACE DEMPSEY,
BRUCE FULLER,
Attorneys for Petitioner,
723 Investment Building,
Washington, D. C.